

APPENDIX A

1. Memorandum Opinion of Court of Appeals.

Pennsylvania Company for Insurance on Lives and Granting Annuities, as Executor of J. Walter Zebley, Deceased, et al., Appellants v. James L. Kauffman, as Executor of William R. Davis, Deceased, et al., Respondents.

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 4, 1942, which affirmed a judgment entered upon an order of the court at Special Term (Leary, J.) granting a motion by defendants for judgment dismissing the amended complaint herein, before answer, pursuant to rule 107 of the Rules of Civil Practice, on the ground that it did not state facts sufficient to constitute a cause of action, and for other incidental relief. One Davis was president of a Delaware corporation which was wound up through receivership proceedings with the result that the only asset remaining was a judgment against Davis which the stockholders of the Delaware corporation, plaintiffs herein, obtained in an action which they brought against him in the State of Oklahoma. At the instigation of Davis and with money supplied by him, shares of the Delaware corporation were thereafter bought by persons who intervened in the Oklahoma action and who applied therein for a sale of the judgment against Davis. While that application was denied by the District Court of Oklahoma, subsequently in an independent action for the same relief, such court directed an assignment of the judgment against Davis to his nominee for a consideration, and through the carrying out of that direction the judgment against Davis was released and satisfied. In subsequent litigation the canceling of such judgment was sustained by the Supreme

Appendix

Court of Oklahoma. The plaintiff thereafter brought the present action in the Supreme Court of this State, basing their right to recover upon the judgment *originally* obtained against Davis in the State of Oklahoma. The Special Term dismissed the complaint on the ground that it was bound, under the full faith and credit clause of the Federal Constitution (Art. IV, § 1), by the judgment of the Supreme Court of Oklahoma.

Orville C. Sanborn, Richard S. Holmes and George E. Reynolds for appellants.

C. Horace Tuttle and John F. Faulkner for respondents.

Appeal dismissed, with costs, on the ground that no substantial constitutional question is involved. No opinion. (See 288 N. Y. 625.)

Concur: Lehman, Ch. J., Loughran, Finch, Rippey, Lewis, Conway and Desmond, JJ.

2. Memorandum Opinion of Appellate Division and Dissenting Opinion of Dore, J.

The Pennsylvania Company for Insurance on Lives and Granting Annuities, as Executor, Etc., of J. Walter Zebley, Deceased, and Others, Appellants, v. James Lee Kauffman, as Executor, Etc., of William Rhodes Davis, Deceased, and Others, Respondents, Impleaded With Others, Defendants.

Appeal by the plaintiffs from an order of the Supreme Court, entered in the New York county clerk's office on September 11, 1940, granting a motion of defendants William R. Davis and others to dismiss the amended complaint for insufficiency pursuant to subdivisions 5 and 7 of rule 107 of the Rules of Civil Practice, vacating the temporary injunction, and denying plaintiffs' cross-motion for leave

Appendix

to further amend the amended complaint and for other relief, and from the judgment entered thereon.

Judgment and order affirmed, with costs. No opinion.

Present—Martin, P. J., O'Malley, Townley, Dore and Cohn, JJ.; Martin, P. J., and Dore, J., dissent; dissenting opinion by Dore, J.

Dore, J. (dissenting). We think we should deny this motion to dismiss under subdivisions 5 and 7 of rule 107 of the Rules of Civil Practice so that disputed issues as to jurisdictional facts and the application of the rule of *res judicata* to all the parties involved may be fully developed at a trial and not summarily disposed of on a motion before answer. Accordingly, we dissent and vote to reverse the judgment and order appealed from granting defendants' motion and denying plaintiffs' cross-motion to file an amended complaint and to deny defendants' said motion and grant plaintiffs' motion to file an amended complaint.

Martin, P. J., concurs.

**3. Opinion of Mr. Justice Leary at Special Term,
Part I, Supreme Court, New York County.**

(New York Law Journal, August 28, 1940)

By Mr. Justice Leary.

Pennsylvania Co. for Insurance on Lives & Granting Annuities, &c., et al., v. Davis—The defendants move to dismiss the first cause of action against the defendant Davis upon the ground that the judgment upon which the cause of action is based has been released and discharged of record; to dismiss the second cause of action against all of the defendants and the balance of the causes of action

Appendix

against all of the defendants other than Davis on the ground that there is an existing final judgment of the Supreme Court of the State of Oklahoma determinative of all of the causes of action; to dissolve and vacate temporary injunction orders against the defendant Davis and Davis & Co., Inc., on the ground that the complaint does not state a cause of action for the reasons previously stated. The plaintiff cross-moves to amend the amended complaint and for additional relief. The basic question for determination is, may this court, under all the facts submitted, pass on the mandate of the Supreme Court of Oklahoma, or is it bound by Article IV, section 1 of the Constitution of the United States (full faith and credit clause). The plaintiff asks that this court decide that the court of first resort in Oklahoma lacked jurisdiction, though that question has been determined adversely to the plaintiff here in the court of last resort in Oklahoma. Plaintiff also attacks the decision of the Supreme Court of Oklahoma as being corrupt. The Supreme Court of the United States in *Green v. Van Buskirk* (168 Wall. 139), *Carpenter v. Strange* (141 U. S. 87), *Fauntleroy v. Lum* (210 U. S. 230) and the numerous other authorities cited in those cases precludes the action urged by the plaintiff. Our Court of Appeals in *Smith v. Central Trust Co.* (154 N. Y. 333), recognized the same principle, as did the Supreme Court of Oklahoma in *Goodeagle v. Moore* (89 Okl. 211). The defendant's motion is in all respects granted and the plaintiffs' motion is denied. Settle order.

4. Excerpt from Majority Opinion of Supreme Court of Oklahoma, and Excerpt from Dissenting Opinion of Hurst, J.

Majority Opinion:

“On the other questions the testimony and exhibits cover more than 1050 typewritten pages in the rec-

Appendix

ord. It is, therefore, not practical to set forth the evidence or even the substance thereof in full. The record does disclose, however, that the idea of a sale or liquidation of the judgment against Davis originated with Bowden. He evidently learned of the judgment, and had some information to the effect that Davis might be able to assist him in a material way in financing his (Bowden's) sale stamp enterprise. It appears that he conceived the idea that if he could obtain the judgment or control thereof he could use it to move Davis to his assistance. He first talked to Honnold about it and apparently led him to believe that he could and would pay something like \$50,000.00 for the judgment. He was unable to raise that sum or anything like it. Thereafter he went to New York and contacted Davis, and from that time on Bowden and Davis were acting together. They, through Bowden, had Mr. Schwabe investigate the record and advise as to whether the judgment was valid. Upon learning that the judgment could not be set aside, they proceeded under the apparent advice of Schwabe to buy up some 290 shares of the preferred stock of the Davis Malcona Company. The stockholders were the real owners of the judgment. Davis, or some corporation in which he was interested, furnished the money with which to purchase said stock and to pay all the expenses incident to, or connected with, the whole transaction including Schwabe's attorney's fees. Davis apparently knew all about the activities of Bowden and Valerius. Valerius appears to have been only a handy man who gave his name to the proceedings. Davis apparently did not trust Bowden entirely, and by himself, or through his legal advisers, insisted that when and if the sale of the judgment was consummated, the sale and assignment must be made to Bowden or his nominee, and insisted on selecting the nominee in the person of Thornburg."

(For full opinion see Vol. 1, pp. 20-45; 187 Okl. 436, P. 2d 380.)

*Appendix**Dissenting opinion of Hurst, J.:*

"I am of the opinion that the record does not justify a reversal, and that the conduct of Davis was such that he is not entitled to prevail. Briefly, the record is as follows: In 1923 Davis was instrumental in organizing the Davis-Malcona Company and became its President and, with one Hibbs, its manager. Soon thereafter he fraudulently converted to his own use some \$130,000 of the funds of the company. This embezzlement by Davis was followed by the insolvency and receivership of the company. On January 2, 1929, judgment was rendered against him for \$169,123.47 by reason of such misappropriation, in an action instituted in February 1924 by the preferred **stockholders of said company**. In 1936, Davis being anxious to get rid of the judgment, employed Bowden as his agent to purchase some of the preferred stock of the company so that as a stockholder he could institute proceedings to procure the sale of the judgment so he could purchase it in the name of his agent **and get satisfaction of the judgment**. Bowden interested Valerius in the transaction. The agents so employed, with money furnished by Davis, purchased stock in the company, and in their own names sought to intervene in the original action. In February, 1937, objections by the plaintiff's attorneys to such intervention were set for hearing. It was then charged that Bowden and Valerius were in fact representing Davis, but at that hearing both Bowden and Valerius falsely testified that Davis was not being represented by them. Bowden, in the subsequent hearing before Judge Staley, admitted that Davis furnished the money to buy the stock. Davis also admitted that he so furnished the money. The plea of intervention was denied, and then Bowden and Valerius filed an independent action, seeking the appointment of a receiver to sell the judgment, and it culminated in the sale of the judgment against Davis to Davis, through his agent Bowden. The judgment with interest then amounted to more than \$240,000 and was sold for \$9,120.00. Both the inter-

Appendix

vention proceedings and the receivership proceedings were heard before Judge Williams, who was deceived by said false testimony and by the false allegations of the petition to the effect that Bowden and Valerius were acting for themselves and on behalf of all other stockholders, when in fact the proceedings were instituted for Davis and against the interest of the other stockholders. After the hearing at which the false testimony of Bowden and Valerius was given Judge Williams, who in the meantime had resigned and been succeeded by Judge Staley, testified that the proceedings 'went forward without my knowledge that Mr. Davis was concerned.'

"Judge Staley, from whose judgment vacating the sale and satisfaction of the judgment the present appeal was taken, found as follows:

'The court further finds that the defendant, Davis, and the said N. E. Bowden, and the other defendants herein associated with the said Davis and Bowden, including the said S. R. Thornburg, were guilty of fraud upon the District Court of Tulsa County, Oklahoma, and the receiver of the Davis-Malcona Company in the transaction wherein the said judgment was sold to the said S. R. Thornburg and that the said fraud consisted of withholding from the stockholders of Davis-Malcona Company, the District Court of Tulsa County, Oklahoma, and the receiver of the Davis-Malcona Company, the information that Bowden was acting for and on behalf of W. R. Davis and, further consisted of the said Bowden's affirmative acts and declarations to the effect that he was acting for himself and not for the said Davis, when in truth and in fact he was the paid agent of the said Davis to secure the satisfaction of said judgment or to acquire the ownership of said judgment.'

"The testimony of Judge Williams, set out above, shows that the court was imposed upon by said perjury and false allegations, and this is sufficient, under the decisions of this court, to justify vacating the sale. *Jones v. Snyder*, 121 Okla. 254, 249 P. 313;

Appendix

Federal Tax Co. v. Board of County Commissioners, Okla., 102 P. (2d) 148; 15 R. C. L. 705, 761; 34 C. J. 282.

"In the present case the deception practiced was cleverly screened by following an apparently adversary legal procedure, such as making the stockholders parties defendant, giving notice of the order to show cause, and the appointment of a receiver to sell the stock, which gave an additional appearance of fairness and good faith to the proceeding. But the court should look to the substance, not to the form. I cannot escape the conclusion that the proceeding resulting in the sale of this judgment was from its inception designed to, and did, perpetrate a fraud upon the court in which it was brought, and upon the stockholders who owned the judgment. From the purchase of stock by the agents of Davis, in order that they might, as apparently bona fide stockholders request that the judgment be sold, down to the consummation of their fraudulent purpose, every move made in the proceeding, and all the evidence produced by them, was made and done to conceal their real purpose, and to impose upon the court and the stockholders. No such deception or fraud as that contained in the record in the instant case was present in the cases relied upon in the majority opinion, on which the first syllabus is predicated.

"This cause had its beginning in 1924 in breach of trust and embezzlement and its ending in 1937 in deception, concealment and perjury. It is my view that courts of justice have no higher duty than to see to it that parties guilty of such conduct do not profit thereby. I regret to see this court render a decision that permits Davis to profit by his fraudulent scheme" (R., Vol. I, pp. 552-556).